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Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- :

Case No. ~~7106~~

BYRON S. AMBROSE, :

16148

Defendant-Appellant. :

---

BRIEF OF DEFENDANT-APPELLANT

---

An appeal from a conviction of Attempted Homicide in the second degree in the Fourth Judicial District Court in and for Utah County, State of Utah, the Honorable George E. Ballif, presiding.

---

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH, :  
Plaintiff-Respondent, :  
-vs- : Case No. 7106  
BYRON S. AMBROSE, :  
Defendant-Appellant. :

---

BRIEF OF DEFENDANT-APPELLANT

---

STATEMENT OF THE NATURE OF THE CASE

This is a criminal action brought by the State of Utah against the Defendant-Appellant, BYRON S. AMBROSE, alleging that the Defendant-Appellant intentionally or knowingly attempted to cause the death of Gordon Birrell, in violation of Utah Code Annotated (1953), Sections 76-4-101 and 76-5-203, a felony of the second degree.

DISPOSITION IN THE LOWER COURT

The Defendant-Appellant was convicted by a jury and was represented by his court appointed attorney, D. John Musselman, Esq.

RELIEF SOUGHT ON APPEAL

The Defendant-Appellant seeks a reversal of his conviction and dismissal of the charges or in the alternative, a new trial.

### STATEMENT OF THE FACTS

The Defendant-Appellant was tried twice in six months for attempted homicide arising from separate factual situations. This appeal directly concerns the second trial of September 14 and 15, 1978. The first trial resulted in a mistrial and this court held that a retrial was barred by the double jeopardy provision of the Utah and Federal Constitutions. State of Utah v. Ambrose, 598 P.2d 354 (1979).

During the course of the second trial, Frank Mitchell, alleged victim of the first incident, entered the courtroom, and the trial judge immediately called a recess. The judge asked Mr. Mitchell not to remain in the courtroom but allowed Mitchell's wife to stay in the audience. Mitchell remained in the courthouse accessible to the jury during breaks and recesses. No action was taken by the judge to isolate the jury from any prejudicial actions by Mitchell, his wife, or other third persons.

The critical factual dispute in this case concerned the actual incident of the shooting. The prosecutor, in his closing argument to the jury, characterized the dispute as one of believing either the alleged victim or the defendant-appellant. To destroy the credibility of the defendant-appellant, the prosecutor relied substantially on evidence concerning the shots fired and the truck that was hit by those shots. Evidence was offered to explain the route of the bullets after they hit the truck.



The police impounded the truck as evidence and the truck remained in their custody until "we [the police] had gotten what we [the police] needed from it." Then the truck was released to the registered owner in Colorado. The police did not perform any ballistics tests on the truck and released it without informing the defendant-appellant. The defendant-appellant did not have the opportunity to perform any tests on the truck, or use the truck as evidence to bolster his credibility. The jury found the defendant-appellant guilty. Currently the defendant-appellant is incarcerated in the Utah State Prison.

#### POINT I

THE PROSECUTION BREACHED THEIR DUTY TO PREVENT THE LOSS OR DESTRUCTION OF EVIDENCE FAVORABLE TO THE ACCUSED IN VIOLATION OF DUE PROCESS.

The prosecution in the closing argument of this trial properly characterized the factual dispute to be resolved by the jury as deciding to believe either the alleged victim or to believe the defendant-appellant. (T 251:12-23) The prosecution strongly emphasized conflicting testimony between officer Bath and the defendant-appellant concerning the truck that received the bulk of the shots which were fired. (T 251-253) The Orem Police Department retained custody of the impounded truck as evidence until "we [the police] had gotten what we [the police] needed from it," and then it was released without notice to the defendant-appellant to the registered owner in Colorado. (T 151:5-14).

No ballistics tests were performed on the truck by the police (T 150 and T 235: 23-27) and the defendant-appellant did not have any opportunity to perform tests on the truck or use the truck to establish his credibility. The defendant was convicted.

This court has recognized that the prosecution is under a duty to treat the accused fairly (State of Utah v. Adams, 583 P.2d 89 (1978)) and that a deliberate suppression or destruction of evidence by the prosecution constitutes a denial of due process if the evidence is material to the guilt or innocence of the accused. State of Utah v. Stewart, 544 P.2d 477-479 (Utah 1975) The duty to treat the defendant fairly extends not only to a deliberate destruction but also the negligent destruction of evidence material to the defense is tantamount to unlawful suppression and a denial of due process. People v. Harmes, 38 Colo. App. 378, 560 P.2d 470 (1976). Those charged with the prosecution have a duty to seek justice (Code of Professional Responsibility, Canon 7, EC 7-13; see also ABA, Standards Relating to the Prosecution Function) and to prevent the loss or destruction of evidence favorable to the accused. People v. Roblas, 568 P.2d 57 (Colo. 1977).

The duty of fairness to the accused also requires the prosecution to affirmatively preserve evidence. This court recognized that principle in State of Utah v. Stewart, supra at 479:

"Those charged with investigation and prosecution of crime should retain intact all records and other evidence pertaining to the case until it is finally disposed of."

The Supreme Court of Arizona in State v. Maloney, 105 Ariz. 348, 352, 464 P.2d 793, cert. denied, sub nom. Maloney v. Arizona, 400 U.S. 841, 91 S. Ct. 82, 27 L. Ed.2d 75 (1970), stated:  
"[C]learly the state is not to decide for the court what is admissible, or, for the defense, what is useful." See also: Scales v. City Court, City of Mesa, 122 Ariz. 231, 594 P.2d 97 (1979).

The State must, in order to insure due process under the 5th and 14th Amendments to the U.S. Constitution and under Article I, Section 7 of the Utah Constitution, collect and preserve evidence that is reasonably and foreseeably favorable to the accused, especially when that evidence is in the immediate control of the prosecution. The Colorado Supreme Court in Garcia v. District Court, 21st Judicial District recently held:

"The failure of the state to collect and preserve evidence, when those acts can be accomplished as a mere incident to a procedure routinely performed by state agents, is tantamount to suppression of that evidence. It is incumbent upon the state to employ regular procedures to preserve evidence which a state agent, in the regular performance of his duties, could reasonably foresee 'might' be 'favorable' to the accused." [emphasis added] 589 P.2d 924 (Colo. 1979).

Error is committed where the destroyed or lost evidence may have created a reasonable doubt of the accused's guilt.  
U. S. v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

If the accused can make a showing of materiality of the lost evidence and prejudice to the accused, then the State's failure to preserve a truck should have resulted in a dismissal of the criminal charges. State of Idaho v. White, 98 Idaho 781, 572 P.2d 884 (1977).

In this case, the prosecution breached their duty of fairness to the accused and violated the accused's right of due process by failing to prevent the loss or destruction of evidence favorable to him. The Orem Police Department knew or should have known that a vehicle substantially involved in an alleged attempted homicide could be evidence favorable to the accused. The credibility of the accused's testimony turned directly on the evidence of the shooting and the truck and the prosecutor so argued to the jury. The police failed to preserve the impounded vehicle in their possession and did not perform ballistics tests on the vehicle. The accused did not have the opportunity to so test the vehicle since the vehicle was returned to its owner in Colorado. If the accused had the opportunity to test the evidence, he may have bolstered his credibility before the jury and received an acquittal. Because the error committed was prejudicial to the defendant-appellant his conviction should be reversed and the charges dismissed on grounds that defendant's due process rights were violated.

## POINT II

THE DEFENDANT-APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO ADEQUATELY TAKE MEASURES TO PRESERVE EVIDENCE FAVORABLE TO THE ACCUSED AND MOVE FOR DISMISSAL BASED ON THE LOSS OF FAVORABLE EVIDENCE.

Mr. D. John Musselman, Esq., was the court appointed attorney for the defendant-appellant during his trial of September 14 and 15, 1978. As previously argued in Point I of this brief, certain crucial evidence favorable to the defendant (a truck) was not preserved for trial and was unavailable for the accused's defense. Further, the record as a whole discloses that defendant's court appointed counsel failed to move for a dismissal based upon the loss of favorable evidence.

The 6th and 14th Amendments to the U.S. Constitution and Article I, Section 12 of the Utah Constitution guarantee that the accused is entitled to the effective assistance of court appointed counsel if indigent. Webster v. Jones, 587 P.2d 528 (Utah 1978). The test this court has adopted to examine the effectiveness of defense counsel was stated in State of Utah v. McNicol, 554 P.2d 203 (Utah 1976):

"The record must establish that counsel was ignorant of the facts or the law, resulting in withdrawal of a crucial defense, reducing the trial to a 'farce and a sham.'" supra at 204.

The Court in McNicol, supra, recognized the vital distinction between a constitutionally adequate defense consisting of a careful factual and legal investigation and tactical or strategic decisions after a careful factual and legal inquiry.

A careful factual investigation by the defendant's counsel would have disclosed the vital importance the truck would hold in determining what happened at the scene of the alleged crime and in determining the credibility of the accused. It is not unreasonable to expect that the defendant would want his own ballistic reports on the gun and on the truck to establish his only defense.

Most importantly, the defendant should not be punished or penalized for his court appointed counsel's procrastination in seeking to preserve relevant and favorable evidence. People v. Harmes, 38 Colo. App. 378, 560 P.2d 470 (1976).

Further, once defense counsel had determined that the trial would turn on such factual evidence, and that such evidence was no longer available due to actions of the police (See Point I in this brief), a careful legal inquiry into relevant law would have disclosed that a motion to dismiss should have been granted on the grounds that evidence favorable to the accused was lost or destroyed by the police. (See Point I of this brief).

The only reasonable explanation for the record in this case, is that the defense counsel was ignorant of the facts because of a lack of investigation and that he was unaware of relevant law that resulted in the withdrawal of a crucial defense reducing the trial to a sham. Had competent counsel been aware of the facts and law of this case, competency would require affirmative action to preserve the evidence or alternatively, a motion to dismiss based upon the loss or destruction of evidence favorable to the accused that was in police custody. The record does not disclose any action by counsel to preserve the truck as evidence, or to move to dismiss on grounds of prosecution destruction of evidence. Such error was prejudicial to the accused and denied him the effective assistance of court appointed counsel.

Therefore, alternatively, the defendant-appellant's conviction should be reversed and the case dismissed.

### POINT III

THE TRIAL JUDGE FAILED TO TAKE PROPER PROTECTIVE MEASURES TO ISOLATE THE JURY FROM PREJUDICIAL ACTIONS AND INFORMATION IN VIOLATION OF THE ACCUSED'S RIGHTS TO AN IMPARTIAL JURY AND DUE PROCESS.

The record discloses that during the course of this trial, the alleged victim of the accused in a previous trial, Frank Mitchell, entered the courtroom during the testimony and the trial judge immediately called a recess. (T 112:9-30, 113, 114,

115:1-29). Mitchell's wife was also present during the trial. Mitchell was asked to leave the courtroom but was allowed to remain in the courthouse, accessible to the jurors. (T 242, 243). Mitchell's wife remained in the courtroom (T 115). No action was taken by the trial judge to prevent further prejudicial occurrences to the jury.

It is well established in Utah "that due process requirements of the Constitution of Utah and the United States guarantee that an accused receive a trial before a fair and impartial jury free from outside influences." State v. Pierre, 572 P.2d 1338, 1348 (Utah 1977) cert. denied 439 U.S. 882 (1978). Further, the U. S. Supreme Court has mandated that when necessary the trial judge must take appropriate measures to maintain a fair and impartial jury free from outside influences. Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed. 2d 600 (1966). See also: State v. Jarrett, 112 Utah 335, 187 P.2d 547 (1947).

Recently the U.S. Supreme Court has held that the trial judge has the affirmative constitutional duty to minimize prejudicial acts and may order sequestration of the jury or take any of a variety of protective measures even when they are not strictly and inescapably necessary in order to insure that inadmissible prejudicial information be kept from the jury. Gannett Co., Inc. v. DePasquale, \_\_\_ U.S. \_\_\_, 99 S.Ct. 2898 (1979). Moreover, the U.S. Supreme Court in DePasquale, supra, held that the right to an impartial jury is personal to the



accused and that members of the public have no constitutional right to attend criminal trials. Thus, the public may be excluded from criminal trials.

The failure of the trial judge to exclude both Frank Mitchell and his wife from the courtroom and the courthouse where the jury was present during breaks and recesses was prejudicial error in light of the informative record. (T 248:8-11) Alternatively, the trial judge should have taken other protective measures such as sequestration to isolate the jury from any potential prejudicial comments or actions. The record discloses that poor facilities were perhaps the underlying reason for not sequestering the jury. (T 18:15-18).

Therefore, because of the actual prejudicial actions that took place in or near the courtroom, the trial judge failed to take necessary protective measures such as exclusion of the public and sequestration of the jury to preserve the accused's right to trial by an impartial jury and right to due process guaranteed by the U.S. Constitution, Sixth Amendment and the Utah Consitution, Article I, Section 12. Such failure resulted in actual prejudice to the accused and the defendant-appellant's conviction should be reversed and a new trial granted.

### CONCLUSION

The loss or destruction of evidence favorable to the defendant was a breach of the prosecution's duty of fairness and

violative of due process. Said breach requires the conviction to be reversed and the case dismissed. Alternatively, said loss or destruction of favorable evidence was caused by ineffective court appointed counsel because of counsel's ignorance of the facts and of the law resulting in the withdrawal of a crucial defense to the accused which reduced the trial to a sham, requiring a reversal of the conviction and dismissal of the action.

Moreover, the trial judge failed to take proper protective measures to preserve the accused's constitutional right to trial by an impartial jury. Under this theory, the conviction must be reversed and remanded for a new trial.

RESPECTFULLY SUBMITTED this 25 day of October, 1979.

  
E. KENT SUNDBERG  
Attorney for Appellant

#### MAILING CERTIFICATE

I hereby certify that I mailed two true and correct copies of the foregoing Brief of Defendant-Appellant, postage prepaid, this 25 day of October, 1979, to the following:

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